No. 92-1407

In The

Supreme Court of the United States

October Term, 1992

PATRICIA WILLIAMS HOWARD,

Petitioner,

v.

WOLFF BROADCASTING CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court of Alabama

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an equal protection claim was presented in the courts below?

2. Whether there is state action?

3. Whether Alabama's "at will" doctrine violates the Equal Protection Clause of the Fourteenth Amendment?

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STATEMENT OF JURISDICTION

Respondent respectfully submits that this Honorable Court is without jurisdiction to review the decision of the Supreme Court of Alabama in this case, rendered November 25, 1992, because no federal question or claim was presented by petitioner in the courts below and the Alabama Supreme Court did not decide any federal question.

STATEMENT OF THE CASE

Petitioner's statement of the case is factually incomplete and inadequate in the discussion of the claims and proceedings in the courts below.

Petitioner was unemployed when she was hired by Wolff Broadcasting Corporation in October of 1987, and her employment with respondent was terminated in January of 1988.[1] Petitioner asserts that she "lost her job solely because she is female." (Pet. 3). Although the Alabama Supreme Court assumed for purposes of reviewing a summary judgment that petitioner was fired because she was a female, the actual reason for petitioner's termination is a disputed question of fact.

Respondent's motion for summary judgment was based *inter alia* on the affidavit testimony of Peter Wolff, the president of Wolff Broadcasting Corporation:

> Patricia Williams Howard had both in person and via telephone requested money from Pete Wolff. Patricia Williams Howard made certain sexual advances to Pete Wolff allegedly in exchange for his assistance, financial or otherwise. Patricia Williams Howard then threatened to go on the air at the radio station and accuse Pete Wolff of being a homosexual, because Pete Wolff refused her advances. Pete Wolff felt this amounted to attempted extortion and then

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[1] Respondent, Wolff Broadcasting Corporation, is an Alabama corporation solely owned by Peter Wolff. There are no parent or subsidiary companies.

> called Keith Holcombe and told him to get Patricia Howard off the air.

(R. 56, 129).

Petitioner alleged that on the night her employment was terminated, the station manager, Mr. Holcombe, told her that the owner's wife did not want any females on the air: "When he fired her, Mr. Holcombe told her that she was being fired because Karen Wolff, the owner's wife, did not want any females on the air" (P. 3 of the brief of Patricia Williams Howard, Appellant, in the Supreme Court of Alabama). Petitioner's version is disputed. Karen Wolff filed an affidavit in which she testified, "I do not have any personal knowledge as to why Patricia Howard was terminated from Wolff Broadcasting as I had nothing to do with her termination." (R. 127). The station manager filed an affidavit wherein he testified, "Karen Wolff, one of the Defendants in this case, did not interfere with Ms. Howard's employment at Wolff Broadcasting nor did she have anything to do with Ms. Howard's termination." (R 128).

The reason for petitioner's termination was vigorously contested in both the trial court and the Supreme Court of Alabama. In her brief to the Supreme Court of Alabama, petitioner asked the court to conclude (assume), for purposes of reviewing the summary judgment, that she was terminated because she was a female: "Because of the posture of this case, the Court must conclude, for purposes of this appeal, that Howard was fired solely because she was female." (Appellant's Reply brief, p. 3). Petitioner further argued that she had "presented evidence to the trial court which created a genuine

issue of material fact" as to the reason for her termination. *Id.*

Respondent is aware that the Opinion of the Alabama Supreme Court contains the erroneous statement that petitioner was terminated solely because she was a female. Respondent did not move for rehearing of the November 25, 1992, Opinion because respondent had prevailed and because, when reviewing the propriety of the summary judgment, it made no difference whether the reason for petitioner's termination was a disputed question of fact. The Alabama Supreme Court held, in effect, that it would not judicially create a new public policy exception to Alabama's traditional employment at will doctrine *even if* petitioner had been terminated because of gender.

It is undisputed that there was no written agreement defining the terms of petitioner's employment with respondent and no promise of permanent employment or any stated duration of employment. Petitioner's two claims against respondent were based on a sign she saw in the lobby on the day she applied for employment:

> Q. Tell me as best you can remember what the sign said.
>
> A. I don't remember really, just to do with discrimination. I'm not sure. I can't remember.
>
> Q. You can't remember what it said?
>
> A. Not exactly, no.
>
> Q. Did you have an understanding of what it said when you were hired at Wolff Broadcasting?

> A. Well, it was there where you could see it; I guess so.
>
> Q. Tell me what your understanding of what it said as you remember it today was.
>
> A. That you wouldn't be fired, I guess, if you were a female, black or any other, you know.

(R. 148-149).

It is undisputed that petitioner did not file a claim with the EEOC alleging sex discrimination pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), nor did petitioner file any complaint in any state or federal court stating a claim under that statute. It is undisputed that petitioner did not file any complaint with the Federal Communications Commission nor institute any proceeding challenging the license of respondent based on alleged violation of the FCC Equal Employment Opportunity Regulation, 47 C.F.R. § 73.2080(c)(i). In effect, petitioner failed to comply with any of the administrative procedures which might be a prerequisite to bringing a discrimination claim in court, and petitioner failed to file any claim in any court alleging violation of the Civil Rights Act or of any provision of the Constitution of the United States or of the State of Alabama.

One year and ten months after her termination, petitioner filed a complaint in state court alleging two counts against respondent: Count I, Alabama common law fraud; Count II, breach of contract. Respondent moved for summary judgment and argued *inter alia* that, under established Alabama law, petitioner's claims were barred

by Alabama's common law "at will" employment doctrine, that petitioner's claims did not come within any recognized exception to the employment "at will" doctrine in Alabama, and that certain evidentiary deficiencies existed in petitioner's claims. After consideration of the briefs, arguments, and materials submitted by respondent and petitioner, the trial court granted respondent's motion. The trial court concluded that petitioner's employment was "at will." The trial court declined to create a "public policy" exception to the at will doctrine, "having considered the numerous precedents established by the Supreme Court of Alabama disallowing a 'public policy' exception to the 'at will' doctrine, and having determined that any change in the substantive law of the state must come from the legislature." (Pet. App. 2a). The trial court also concluded that petitioner's fraud claim failed to meet the evidentiary requirements of Alabama law. The order granting summary judgment did not address any claim under the Civil Rights Act nor any claim that petitioner's right to equal protection of the law had been violated or would be violated by Alabama's at will doctrine, because no such claims or issues had been presented to the trial court.

On appeal to the Supreme Court of Alabama, petitioner argued that her breach of contract claim came within a recognized exception to Alabama's "at will" employment doctrine,[2] and that the Alabama court should create a new "public policy" exception to the at

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[2] Petitioner argued that her breach of contract claim came within the exception recognized in *Hoffman-LaRoche, Inc. v. Campbell*, 512 So.2d 725 (Ala. 1987).

will doctrine, and that petitioner's fraud claim met the requirements of Alabama law. Petitioner never advanced the argument that Alabama's "at will" doctrine, either in general or as applied in this case, violates equal protection of the law under the Constitution of the United States or the State of Alabama. Thus, petitioner failed to raise *any* constitutional question or issue in either the trial court or in the Supreme Court of Alabama.

The Opinion of the Supreme Court of Alabama did not condone or approve gender-based discrimination in employment. The Supreme Court of Alabama held that petitioner's employment was terminable "at will" and, under Alabama's long standing "at will" doctrine, such employment may be terminated by the employer or employee at any time with or without cause or justification. The court upheld the summary judgment on petitioner's fraud claim because petitioner failed to meet the Alabama evidentiary requirements of a claim of promissory fraud. Finally, the court declined to judicially create a "public policy" exception to the "at will" employment doctrine:

> In refusing to adopt a 'public policy' exception, we should not be understood as condoning a person's discharge because of gender. We merely hold that it is the province of the legislature to create such an exception, if it should determine that employees such as Howard, who cannot come within the provisions of the Equal Employment Act, should be given the right to sue for damages.

(Pet. App. 14b).

SUMMARY OF ARGUMENT

No federal question was presented in the courts below. The first time petitioner asserted any violation of her right to equal protection of the law was in her petition to this Court. Review should be denied due to petitioner's failure to raise in the courts below *any* claims or issues under the Constitution of the United States. Additionally, there would be no reason for review even if petitioner had presented her equal protection argument in the Alabama courts because Alabama's common law employment "at will" doctrine does not violate equal protection of law.

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD NOT GRANT REVIEW TO DECIDE QUESTIONS NOT PRESENTED IN THE COURTS BELOW

Petitioner apparently contends that the Supreme Court of Alabama deprived her of equal protection of the law in its Opinion upholding the summary judgment entered by the trial court. Petitioner contends that Alabama's employment "at will" doctrine and the refusal of the trial court and the Supreme Court of Alabama to judicially create a "public policy" exception to that doctrine somehow deprived petitioner of equal protection of the law. Review is due to be denied because petitioner never presented a claim in the courts below that either her termination or the "at will" doctrine, in general or as applied to her case, violate equal protection; and that claim was never passed upon below.

When opposing respondent's motion for summary judgment in the trial court, petitioner never argued that her termination or the "at will" doctrine violated equal protection. Petitioner never argued on appeal, in either her initial appellant's brief or her reply brief, that her termination or the "at will" doctrine violated equal protection. Petitioner never even used the words "equal protection" nor cited or referred to the Fourteenth Amendment. Petitioner never cited any cases or authorities for the proposition that the Fourteenth Amendment was implicated in this case or would be violated if the court did not create a "public policy" exception to the "at will" doctrine as requested by petitioner. Petitioner never argued that *any* provision of the Constitution of the United States or the State of Alabama had been violated. Petitioner did not even move for rehearing of the November 25, 1992, Opinion of the Supreme Court of Alabama and then attempt to present any such issue. Under these circumstances, where petitioner's equal protection argument was *never* presented or passed upon in the courts of Alabama, this Court is without jurisdiction in this case.

"It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). In *Cardinale* the Court reviewed the reasons for declining to grant certiorari in such cases:

> In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 USC § 1257, there are sound reasons for this. Questions not raised below are those on which the

> record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the application of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, *O'Connor v. Ohio*, 385 U.S. 92, 17 L.Ed.2d 189, 87 S.Ct. 252 (1966), they should be given the first opportunity to consider them.

Id. at 439.

The Court has consistently declined to review federal questions, even constitutional issues, where the question was neither raised nor passed upon in the state court. *Michael H. v. Gerald D.*, 491 U.S. 110, 116-117 (1989)("We do not reach Michael's equal protection claim, however, as it was neither raised nor passed upon below."); *Bankers Life & Casualty Company v. Crenshaw*, 486 U.S. 71 (1988) ("We conclude, however, that these claims were not raised and passed upon in state court, and we decline to reach them here."); *Heath v. Alabama*, 474 U.S. 82 (1985); *Illinois v. Gates*, 462 U.S. 213, 217-222 (1983); *Webb v. Webb*, 451 U.S. 493 (1981); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973) ("We cannot decide issues raised for the first time here."); *Monks v. New Jersey*, 398 U.S. 71 (1970); *Cardinale v. Louisiana*, 394 U.S. 437 (1969).

In *Webb v. Webb*, the Court concluded that it was without jurisdiction to review the petitioner's federal question where the petitioner failed to rely upon the

Federal Constitution in the state court and where the state appellate court did not pass upon any federal question. The Court declined review even though petitioner used the phrase "full faith and credit" in the state court proceedings: "Although petitioner did use the phrase 'full faith and credit' at several points in the proceedings below, nowhere did she cite to the Federal Constitution or to any cases relying on the Full Faith and Credit Clause of the Federal Constitution." 451 U.S. at 496. Petitioner Howard never even used the words "equal protection" at any point in the proceedings in the state courts of Alabama!

"It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Id.* at 496-497. The Court re-emphasized in *Webb* the reasons for adhering to this rule:

> It is appropriate to emphasize again, *see Cardinale v. Louisiana, supra,* at 439, 22 L Ed 2d 398, 89 S Ct 1161, that there are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts. These considerations strongly indicate that we should apply this general principle with sufficient rigor to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below.

In the first place, although the States are sovereign entities, they are bound along with their officials, including their judges, by the Constitution and the federal statutory law. Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements. . . .

. . .

There are also very practical reasons for insisting that federal issues be presented first in the state-court system. The requirement affords the parties the opportunity to develop the record necessary for adjudicating the issue. It permits the state courts to exercise their authority, which federal courts, including this one, do not have at least to the same extent, to construe state statutes so as to avoid or obviate federal constitutional challenges such as vagueness and overbreadth. The rule also insures that if there are independent and adequate state grounds that would pretermit the federal issue, they will be identified and acted upon in an authoritative manner. Finally, if the parties to state-court litigation are required to present their federal claims in the state tribunals in the first instance, those issues will be adjudicated in the state courts where necessary to dispose of the case. In most instances, such a judgment will be supported by an opinion that may well obviate any reason for our giving plenary consideration to

> the case. In terms of our own workload, this is a very substantial matter.

Id. at 499-501.

The Court concluded that, at a minimum, "there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law." *Id.* at 501. These minimal requirements to review by this Court clearly are not satisfied in this case. Petitioner did not claim any violation of equal protection, under either the Federal Constitution or the Alabama Constitution, in the Alabama courts.

There is no ruling in either the order granting summary judgment by the trial court (Pet. App. 1a) or in the Opinion of the Supreme Court of Alabama (Pet. App. 1b) on any question of equal protection or any other constitutional question. The absence of any ruling on petitioner's federal question is evidence that no such question was presented in the state courts: "This Court has frequently stated that when 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.'" *Id.* at 495.

This case is a perfect example of one of the practical reasons why the Court declines review of issues not presented in the state courts. Petitioner failed to assert in the Alabama courts that Alabama's common law "at will" doctrine, either in general or as applied in this case,

violates equal protection of the law. Petitioner now contends the "at will" doctrine encourages gender-based discrimination, but there is absolutely no evidence in the record that the "at will" doctrine was created to promote gender-based discrimination or that the doctrine has had that impact. Petitioner has offered no historical or statistical data to support her equal protection claim. It is likely, even probable, that more males than females have been discharged by Alabama employers without any good reason or for an improper reason, and there is absolutely no evidence in the record that the "at will" doctrine has had any disparate effect upon female employment in Alabama. In other words, the record is undeveloped on the question of whether the "at will" doctrine was created for the purpose of encouraging gender-based discrimination or that it has had that effect.

Petitioner Howard has not met her burden of demonstrating that she presented her equal protection question in the state courts and that it was passed upon by the highest court of the State of Alabama. To the contrary, petitioner did not raise any equal protection question in her pleadings in the trial court, in her opposition to the respondent's motion for summary judgment, in her appellate briefs to the Supreme Court of Alabama, or any application for rehearing of the Opinion of the Supreme Court of Alabama. Petitioner's equal protection question appears, for the first time, in her petition to this Court. Under these circumstances, this Court is without jurisdiction in this case and, under the longstanding rule of this Court and the policy considerations reviewed above, the Court should deny the petition.

II. THERE IS NO STATE ACTION

It is axiomatic that the Fourteenth Amendment protects only against deprivations of Constitutional rights by the state, not by private conduct, however wrongful or discriminatory. "As a general matter the protections of the Fourteenth Amendment do not extend to 'private conduct abridging individual rights.'" *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988). Petitioner's employment with respondent was terminated by respondent, a privately owned corporation, without any state involvement. Even assuming *arguendo* respondent's employment was terminated for reasons of gender, the Fourteenth Amendment would not protect petitioner from such private conduct because respondent's actions are not fairly attributable to the state.

"The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974). Respondent is a licensed broadcast station, but this does not convert respondent's conduct into state action. "Even extensive regulation by the government does not transform the actions of the regulated entity into those of the government." *San Francisco Arts and Athletics, Inc. v. U.S.O.C.*, 483 U.S. 522, 544 (1987). "Most fundamentally, this Court has held that a government 'normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government].'" *Id.* at 546.

Petitioner cites several cases for the proposition that judicial action in private disputes can be a form of state action. (Pet. 11). Each of the cases cited involves unique circumstances and claims not present in this case; and none of the cases cited supports petitioner's proposition that the absence of a common law remedy providing a private right of action for damages against a private employer for alleged gender-based employment discrimination constitutes state action subject to the scrutiny of the Equal Protection Clause of the Fourteenth Amendment.

"Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment." *Blum v. Yaretsky*, 457 U.S. 991, 1004-1005 (1982). And the Alabama Supreme Court did not adopt, encourage, or approve any discriminatory employment practice: "In refusing to adopt a 'public policy' exception, we should not be understood as condoning a person's discharge because of gender." (Pet. App. 14b).

The Alabama court did not approve nor encourage any discriminatory practice; rather, the court simply declined to create a new common law action for wrongful termination based upon concepts of "public policy" – which would also require deciding questions of procedures, limitations, damages, etc., best left to the legislative branch of government. For example, Congress placed various procedural requirements and limitations on actions to redress violations of rights created by Title VII of the Civil Rights Act of 1964. "Under Title VII, cases of alleged employment discrimination are subject to a

detailed administrative and judicial process designed to provide an opportunity for nonjudicial and nonadversary resolution of claims." *Great American Federal Savings & Loan Assoc. v. Novotny*, 442 U.S. 366, 372-373 (1979). Petitioner would apparently have the Alabama court create a new common law right to sue for damages for alleged discriminatory termination without the carefully worked out system of administrative procedures and limitations contained in Title VII. The Alabama court indicated its willingness to enforce any reasonable statutory scheme enacted by the state legislature which might provide some new right to sue for damages in termination cases. The court's refusal to *judicially* create a "public policy" exception to the "at will" doctrine and to create a new action for damages is not an exercise of "coercive power" sufficient to justify holding the state responsible for the actions of private employers.

The mere fact that the common law of Alabama does not provide any private remedy against a private employer where "at will" type of employment is terminated by the employer for an improper reason or motive (or for no reason at all, *e.g., caprice*) does not convert the decision of the private employer into state action. This case involves purely private conduct, neither participated in nor encouraged by the State of Alabama, and is not within the scope of the Equal Protection Clause of the Fourteenth Amendment.

III. ALABAMA'S "AT WILL" DOCTRINE DOES NOT VIOLATE EQUAL PROTECTION

The "at will" doctrine merely provides that in private employment, where the parties have not agreed upon an express duration of employment nor expressly contracted for other limitations on termination, the employment relationship may be terminated with or without cause or justification by either party, even for an improper motive. The doctrine is equally applied to all persons and groups and has no discriminatory purpose.

The Supreme Court of Alabama has consistently declined to judicially create a "public policy" exception to the "at will" doctrine when presented with a wide variety of allegedly wrongful or "improper" terminations. The Alabama court has deferred to the legislative branch of government to enact restrictions, with all of the corresponding procedures, remedies, and limitations, on the right of private employment. Congress and the Alabama legislature have placed some statutory limitations on employment practices, including termination, but petitioner alleges that she does not fall within the protection of those statutes. Instead of challenging the constitutionality of the Civil Rights Statute, Title VII, as violative of equal protection, petitioner instead asserts that the failure of the Alabama courts to create a new common law remedy for persons not within the scope of Title VII somehow violates equal protection. Petitioner's argument ignores the distinctions between the judicial and legislative branches and is without support in the law. Petitioner is contending that a neutral common law doctrine, which is applied equally to all persons and all groups,

violates equal protection of the law. Petitioner's claim is without support in the record or in cases interpreting the Equal Protection Clause.

Even if it is assumed *arguendo* that petitioner had presented her equal protection claim in the state courts and that the conduct petitioner complains of could be attributable to the state, petitioner has failed to make a *prima facie* case under the Equal Protection Clause of the Fourteenth Amendment. The standard for determining whether conduct violates the Equal Protection Clause of the Fourteenth Amendment is not the same as that applied for adjudicating claims under Title VII. *Washington v. Davis*, 426 U.S. 229 (1976). The Equal Protection Clause is not violated merely because a state law or action results in a disproportionate impact on a protected group or class; rather, the law claimed to be discriminatory must ultimately be traced to a discriminatory purpose. *Id.*

A claim based upon the Equal Protection Clause requires evidence of a discriminatory purpose:

> Equal protection analysis turns on the intended consequences of government classifications. Unless the government actor adopted a criterion with the intent of causing the impact asserted, that impact itself does not violate the principle of race-neutrality.

Hernandez v. New York, 114 L.Ed.2d 395, 407 (1991).

The fact that a law or official practice adopted for a lawful purpose has a differential impact on women is not enough to sustain a claim under the Equal Protection Clause. The Court applied the "discriminatory purpose"

requirement to a sex discrimination claim made under the Equal Protection Clause in *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979). The Court examined the discriminatory purpose requirement:

> 'Discriminatory purpose' however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.

Id. at 279 (authority omitted).

There is nothing in the record of this case that would demonstrate that the "at will" doctrine was originally devised to accomplish the collateral goal of allowing or encouraging termination of employment for reasons of gender or that it was applied in this case for that purpose. To the contrary, the Alabama court declined to *judicially* create a new wrongful termination action in the area of private employment out of deference to the legislative branch of government, not because of any discriminatory purpose.

The respondent argued throughout its brief to the Supreme Court of Alabama that the court should not create a new common law action under a "public policy" exception to "at will" employment because perception and declaration of relevant public policy questions are better and more appropriately explored and resolved by the legislature. Respondent quoted from the opinion in *Borden v. Johnson*, 395 S.E.2d 628, 629 (Ga. App. 1990) as follows:

> There are rights created under federal statutes which may be enforced by certain aggrieved at will employees without regard to the principles of state law. Although those at will employees may have no state remedy, they do have a viable remedy for the 'wrongful' termination of their employment. *The determination of whether these federal statutes are reflective of this state's 'public policy' and if so, whether they are sufficiently comprehensive as to obviate the necessity for creation of an additional state remedy are matters to be addressed by legislators who are the elected representatives of the public.*

(P. 30 of appellee's brief, emphasis added).

Respondent also quoted from the opinion in *Murphy v. American Home Products Corp.*, 448 N.E.2d 86, 89-90 (N.Y. App. 1983), as follows:

> The Legislature has infinitely greater resources and procedural means to discern the public will, to examine the variety of pertinent considerations, to elicit the views of the various segments of the community that would be directly affected and in any event critically interested, and to investigate and anticipate the impact of imposition of such liability. Standards should doubtless be established applicable to the multifarious types of employment and the various circumstances of discharge. *If the rule of nonliability for termination of at will employment is to be tempered, it should be accomplished through a principled statutory scheme, adopted after opportunity for public ventilation, rather than in consequence of judicial resolution of the partisan arguments of individual adversarial litigants.*

(P. 32 of appellee's brief, emphasis added).

In conclusion, there is no evidence of any "discriminatory purpose" on the part of the Supreme Court of Alabama in the creation of the "at will" doctrine or in its application in this case. Out of a proper deference to the legislative branch of government, the Alabama court reluctantly declined to create a new common law action for damages for alleged wrongful termination of private employment as an expression of "public policy."[3] The Alabama court applied the "at will" doctrine "in spite of" its possible adverse effect upon a group but not "because of" such adverse effects. There is no violation of the Equal Protection Clause of the Fourteenth Amendment in this case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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[3] A bill has been introduced in the Alabama Senate, S-474, which prohibits employment termination for reasons of gender. The bill has been approved by the Senate Judiciary – Civil Committee and sent to the Senate.